

FEDERAL ELECTION COMMISSION

999 E Street, N.W.
Washington, D.C. 20463

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FIRST GENERAL COUNSEL'S REPORT CELA

MUR: 6680

DATE COMPLAINT FILED: October 31, 2012

DATE OF NOTIFICATION: November 7, 2012

RESPONSE RECEIVED: December 13, 2012

January 29, 2013

DATE OF ACTIVATION: May 7, 2013

ELECTION CYCLE: 2012

EXPIRATION OF SOL: Earliest: June 23, 2017

Latest: September 29, 2017

COMPLAINANT:

North Dakota Democratic-NPL Party

RESPONDENTS:

Congressman Rick Berg
Berg for Senate and Kelly J. Zander
in his official capacity as treasurer
714 Partners LLP
Dr. Jim Frisk
James Wieland
Bradley S. Williams

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 431(8)(A)(i)
2 U.S.C. § 434(a)-(b)
2 U.S.C. § 439(c)(1)(B)
2 U.S.C. § 441a(a)(1)
2 U.S.C. § 441a(f)
11 C.F.R. § 100.52(d)
11 C.F.R. § 100.93

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The Complaint alleges that Congressman Berg used the private plane owned by his partnership, 714 Partners LLP ("714 LLP"), for trips related to his 2012 Senate campaign without the Committee paying for, or disclosing, the flights to the Commission. Compl. at 2-5. As a

1 result, the Complaint alleges that Berg's principal campaign committee, Berg for Senate, violated
2 2 U.S.C. §§ 441a(f) and 434(b) by accepting excessive contributions and failing to report them
3 and that 714 LLP and Berg's partners violated 2 U.S.C. § 441a(a)(1)(A) by making excessive
4 contributions to Berg for Senate. *Id.* at 4-5.

5 Berg for Senate and 714 LLP submitted a response denying the allegations, asserting that
6 Berg was a joint owner of the 714 LLP plane and that Berg for Senate properly paid for Berg's
7 use of the plane in accordance with "the normal business practices of 714 LLP." Resp. at 2-4
8 (Dec. 13, 2012).¹ Respondents also contend that the Committee properly reported its
9 disbursements for the flights and did not exceed Berg's proportional share of use under the
10 partnership's ownership agreements. *Id.* at 2, 4.

11 A review of the complaint, response, and the Committee's disclosure reports provides no
12 reason to believe that Berg for Senate violated the Act in connection with Berg's use of the plane.
13 Accordingly, we recommend that the Commission find no reason to believe that Congressman
14 Rick Berg, or Berg for Senate and Kelly Zander in his official capacity as treasurer, violated
15 2 U.S.C. § 441a(f) by accepting excessive contributions and no reason to believe that 714 Partners
16 LLP and its other individual partners, Dr. Jim Frick, James Wieland, and Bradley Williams,
17 violated 2 U.S.C. § 441a(a)(1)(A) by making excessive in-kind contributions to Berg for Senate.
18 We also recommend that the Commission find no reason to believe that Berg for Senate and Kelly
19 Zander in his official capacity as treasurer violated 2 U.S.C. § 434(b) by failing to report Berg's
20 travel expenditures. Finally, we recommend that the Commission close the file.

21

¹ The Committee and 714 LLP submitted a joint response on December 13, 2012. On January 29, 2013, the four partners of 714 LLP — Rick Berg, Bradley Williams, James Wieland, and Jim Frisk — submitted a separate response incorporating the response previously filed by the Committee and 714 LLP. All references to this response refer to the response filed on December 13.

II. FACTS

In 2012, then-Congressman Rick Berg was the Republican candidate for North Dakota's open Senate seat, and Berg for Senate and Kelly J. Zander in his official capacity as treasurer ("the Committee") was his principal campaign committee. Prior to and during his candidacy, Berg held a one-fourth partnership interest in 714 LLP, an entity which owns a private plane. Resp. at 2.² Dr. Jim Frick, James Wieland, and Bradley Williams owned the remaining partnership interests. *Id.* According to the Respondents, the 714 LLP ownership agreement requires each partner to pay hourly fees to 714 LLP for use of the plane. *Id.* Further, Red River Aero, a charter company, maintains the plane and each partner pays Red River Aero for pilot time and fuel when using the plane. *Id.* Red River Aero's business practice is to issue separate quarterly invoices to each partner for the hourly fees owed to 714 LLP and the pilot time and fuel costs owed to Red River Aero. *Id.* Respondents concede that Berg used the plane for campaign travel and explain that when he did so, Red River Aero sent invoices directly to the Committee. *Id.* at 2, 4. The Committee asserts that it obtained certifications from each partner before each campaign-related flight that the flight would not cause Berg to exceed his proportional share of use under the partnership agreement. *Id.* at 4. The Response includes a blank copy of the certification form that each partner purportedly completed prior to each flight. Resp. at Attach. 1. The Response, however, includes neither any completed certifications for the flights at issue nor a copy of the ownership agreement setting forth the proportional use shares assigned to each partner.

² Berg was also a partner in Wheelberg Partners LLP ("Wheelberg"), another entity that owns a private plane used by Berg. *Id.* None of the flights that are the subject of the complaint's allegations appear to have been on the Wheelberg plane, although the Committee's disclosure reports show that the Committee disbursed funds to Wheelberg for travel during the campaign. According to the Committee, Wheelberg used the same charter company to maintain the plane (Red River Aero) and payment structure to collect fees for use of the plane (quarterly invoices for hourly fees, fuel, and pilot time). See discussion *infra*, discussing payment procedures used by 714 LLP.

1 The Complaint identifies 13 flights between June and September that it alleges Berg took
2 on the 714 LLP aircraft. Compl. at 2. As to the first two alleged flights (flights #1 and #2), the
3 Complaint states that Berg took two campaign-related flights on June 23 from Fargo, North
4 Dakota, to Grand Forks, North Dakota, and back to attend a parade in Grafton, North Dakota. *Id.*
5 To support its allegation, Complainant provides a link to a Facebook page that shows photos of
6 Berg at a parade in Grafton; the webpage, however, does not appear to provide any information
7 about the form of transportation that Berg used to travel to the location. *See id.* at 2, n. 5. The
8 Complaint also provides a link to what appears to be the flight history of an aircraft registered to
9 714 LLP. *See id.* at 2, n 4. While the website includes flights on the dates identified in the
10 Complaint, the source of the aircraft's flight history is unclear and there is no information linking
11 Berg to the listed flights. *Id.* In response, the Committee describes the allegation that Berg used
12 the aircraft on June 23, 2012 as "inaccurate" but provides no further information about how Berg
13 traveled to the event. Resp. at 4, n 2.

14 As to the alleged flights on June 30 (flights #3 and #4) identified in the Complaint, the
15 Respondents represent that the Committee was properly invoiced for the flights and reimbursed
16 714 LLP and Red River Aero on July 11, 2012. *Id.* at 4. The Committee points to its October
17 2012 Quarterly report. *Id.* In addition to the sole \$1,261.74 disbursement to 714 LLP noted in
18 the complaint, the Committee disclosed a \$3,856.43 disbursement to "Red River Aero" for travel
19 on the 714 LLP airplane between April 1 and June 30. *See Berg for Senate Oct. 2012 Quarterly*
20 *Report* (filed 10/15/12).

21 As to the remaining alleged flights (flights #5-#13), the Respondents also represent that
22 the Committee was properly invoiced and made payments on October 18, 2012, to 714 LLP and
23 Red River Aero. Resp. at 4. The Committee's Post-General Report (filed 12/6/12), includes

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1 disbursements to 714 LLP (for hourly fees) and Red River Aero (for pilot time and fuel) for travel
2 by the Committee between July 1 and September 30.³ The Committee also submitted
3 corresponding travel invoices dated October 6, 2012, which show charges for flights during this
4 period, including flights that appear to match flights #5 through #13. *See Attach. 1.* The
5 Committee also provided copies of two duplicate checks showing payment of each invoice on
6 October 18, 2012, 12 days after the date of the invoices. *See Attach. 2.*

7 The chart below summarizes the Committee's disbursements and disclosure information
8 for each of the flights alleged in the complaint.

³ Red River Aero and 774 LLP billed the Committee on a quarterly basis, per its normal practices. *See Resp. at 2.* The quarterly invoice for the travel that occurred from July 1 through September 30, *i.e.* flights #5 through #13, was dated October 6, and the Committee reportedly paid the invoice on October 18. Thus, the payments properly fell in the time frame covered by the Post-General Report (19th day before election through the 20th day after the election, *i.e.* October 18 through November 26, 2012). *See* 2 U.S.C. § 434(a)(2)(i)–(iii). The Complainant's review of the Committee's disclosure reports was necessarily limited to the Committee's 2012 July and October Quarterly Reports (which the complaint refers to as the "June and September Quarterly Reports," respectively) and did not include the Post-General Report because the core complaint was filed on October 30.

1 **Campaign-Related Travel on 714 LLP Plane Alleged in Complaint**

Flight #	Flight Date	Destination	714 LLP Invoice Amount (Date Billed)	Red River Aero Invoice Amount (Date Billed)	Total Paid	Date Paid	Disclosure Report
1	June 23	Grand Forks	N/A ⁴	N/A	N/A	N/A	N/A
2	June 23	Fargo	N/A	N/A	N/A	N/A	N/A
3	June 30	Dickinson	\$1,261.74 (July 11) ⁵	\$3,856.43 (July 11)	\$5,118.17	July 25	October Quarterly (filed 10/15/12)
4	June 30	Fargo					
5	July 3	Bismarck	\$2,281.56 (Oct. 6)	\$4,254.04 (Oct. 6)	\$6,535.60 ⁶	Oct. 18	Post-General (filed 12/6/12)
6	July 4	Fargo					
7	Aug. 14	Bismarck					
8	Aug. 14	Minot					
9	Aug. 23	Fargo					
10	Aug. 23	Bismarck					
11	Sept. 29	Fargo					
12	Sept. 29	Minot					
13	Sept. 29	Fargo					

2 **III. ANALYSIS**

3 The Complaint alleges that the Committee violated the Act when it accepted, and failed to
4 disclose, excessive in-kind contributions in the form of free travel for Berg on the 774 LLP plane.
5 The Complaint asserts that Berg took at least thirteen trips on the plane between June 23 and
6 September 29, 2012, but the Committee disclosed only a single disbursement to 714 LLP in the
7 amount of \$1,261.75 on July 25, 2012. Compl. at 2-3. The Complaint concludes, therefore, that
8 the Committee failed to pay for its multiple uses of the plane. *Id.* at 5.

⁴ See *supra* p. 4.

⁵ The Committee did not provide a copy of the July 11 invoice with its response, but it summarized its contents in the response. See Resp. at 4. Presumably, the amounts included in the invoice covered multiple flights in addition to the two cited in the complaint. See also fn. 12 *infra*.

⁶ The Committee's invoices and disclosure reports also show additional flights that were not mentioned in the complaint. The quarterly invoice from 714 LLP to the Committee shows that the Committee was billed for eight additional flights during that quarter for travel on the following dates: July 27, August 8, 9, 16, 20, 21, September 18 and 22. There are corresponding charges from Red River Aero for each of these flights.

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1 Section 439a(c) of the Federal Election Campaign Act of 1971, as amended ("the Act"),
2 restricts the use of campaign funds for flights on noncommercial aircraft and specifies payment
3 and reimbursement requirements for noncommercial flights that the Act does permit. Generally, a
4 Senate candidate, or the authorized committee of a Senate candidate, may not make expenditures
5 for flights on noncommercial aircraft, unless the candidate or committee pays to the owner,
6 lessee, or other person who provides the airplane, "the pro rata share of the fair market value of
7 the flight."⁷ 2 U.S.C. § 439a(c)(1)(B). The payment must be made within a commercially
8 reasonable time after the date on which the flight is taken, *see id.*, which Commission regulation
9 define as seven days after the first day of the flight. 11 C.F.R. § 100.93(c).

10 The Act, however, also provides an exception to these payment rules for flights on an
11 aircraft owned or leased by the candidate or an immediate family member of the candidate, "so
12 long as the candidate does not use the aircraft more than the candidate's or immediate family
13 member's proportionate share of ownership allows." 2 U.S.C. § 439a(c)(3). Specifically, when a
14 candidate travels on an aircraft that is owned or leased by that candidate under a shared-
15 ownership or other time-share arrangement, and the travel does not exceed the candidate's
16 proportional share of the ownership interest in the aircraft, the candidate's authorized committee
17 pays the "hourly, mileage, or other applicable rate charged the candidate . . . for the costs of
18 travel."⁸ 11 C.F.R. § 100.93(g)(1)(i). The Commission has not specified a time period for

⁷ The Act provides that the "pro rata share" is "determined by dividing the fair market value of the normal and usual charter fare or rental charge for a comparable plane of comparable size by the number of candidates on the flight." 2 U.S.C. § 439a(c)(1)(B).

⁸ If, however, the candidate's use of the aircraft exceeds his proportional share of ownership interest, the exception to the payment rules is not available and the candidate must pay the fair market value of the flight within seven days, as set forth in 2 U.S.C. § 439a(c)(1)(B) and its corresponding regulation, 11 C.F.R. § 100.93(c). *See* discussion *supra* (specifying payment requirements of 2 U.S.C. § 439a(c)(1)(B) and 11 C.F.R. § 100.93(c)). A "proportional share of the ownership interest" in an aircraft means the amount of use to which the candidate or immediate family member is entitled under an ownership or lease agreement. 11 C.F.R. § 100.93(g)(3).

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1 repayment, "in expectation that . . . the candidate will make the repayment in accordance with the
2 normal business practices of the entity administering the shared-ownership or lease agreements.
3 If not, that entity will be deemed to have made a loan to the candidate's committee that would . . .
4 become an in-kind contribution to the candidate's authorized committee, subject to the limits,
5 prohibitions, and reporting requirements of the Act."⁹ Campaign Travel Explanation and
6 Justification, 74 Fed. Reg. 63951, 63962 (Dec. 7, 2009). Prior to each flight, the candidate's
7 committee must obtain a certification from the service provider that the candidate's planned use
8 of the aircraft will not exceed the candidate's proportional share of use under the ownership or
9 lease agreement.¹⁰ 11 C.F.R. § 100.93(g)(3).

10 In this matter, an examination of the Committee's disclosure reports and other records
11 provided by the Respondent, including invoices and cancelled checks, provides no reason to
12 believe that the Respondents violated the Act in connection with Berg's use of the 714 LLP
13 aircraft. This information appears to show that the Committee's payments for the flights
14 complied with the payment exception at 2 U.S.C. § 439a(c)(3), which applies when the candidate
15 does *not* exceed his share of use of the plane pursuant to the applicable partnership agreement.
16 The Committee was invoiced and paid for costs related to the use of the 714 LLP plane for
17 campaign travel in a manner consistent with the customary business practice of the partnership

⁹ The Act defines a "contribution" as "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). The term "anything of value" includes "all in-kind contributions," such as "the provision of any goods or services without charge or at a charge that is less than the usual and normal charge for such goods or services." 11 C.F.R. § 100.52(d)(1). If goods or services are provided at less than the usual and normal charge, the amount of the in-kind contribution is the difference between the usual and normal charge for the goods or services and the amount charged to the political committee. *Id.* All contributions by individuals to candidates and authorized committees are subject to the limitations set forth in 2 U.S.C. § 441a(a)(1)(a), which during the 2012 election cycle, limited contributions to \$2,500 per election. *See also* 11 C.F.R. § 110.1(e). Additionally, the Act requires a candidate's authorized committee to disclose all receipts and disbursements to the Commission. 2 U.S.C. § 434(a)-(b).

¹⁰ "Service provider" in the context of a jointly-owned plane is the person who makes the plane available to the campaign traveler. 11 C.F.R. § 100.93(a)(3)(ii).

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1 and service provider, and the Committee timely reported those payments as disbursements on its
2 disclosure reports. *See* 2 U.S.C. §§ 439a(c)(3), 434(b).

3 It should be noted that, while the Response asserts that the Committee maintained copies
4 of the pre-flight certifications and that Berg's use of the planes was consistent with his partnership
5 agreements, Resp. at 2, Respondents did not provide copies of the signed certifications or
6 partnership agreements setting forth the respective use shares assigned to each partner. *See* 11
7 C.F.R. § 100.93(j)(1)(iv) (requiring the Committee to maintain documentation of the agreement
8 specifying the amount of use allowed, and the pre-flight certifications). The Response includes
9 Red River Aero and 714 LLP invoices provided to, and paid by, the Committee for July 1 through
10 September 30, which show that Berg flew 17 segments on the plane over that 90-day period, but
11 do not itemize how many hours Berg used the plane for campaign or personal purposes, if any,
12 during that period. We are therefore unable to independently verify that Berg's use of the aircraft
13 falls within his proportional share, thereby qualifying for the payment exception at Section
14 439a(c)(3). *See* 11 C.F.R. § 100.93(g)(1)(i).

15 Nonetheless, the Complaint did not allege any facts suggesting that Berg's use exceeded
16 his proportional share. Further, the response expressly asserts that "each time the Committee
17 used the aircraft, it obtained a certification, signed by the other partners, that such use of the
18 aircraft on that particular occasion would not exceed Congressmnn Berg's proportional share of
19 use under the ownership agreement[] of 714 LLP" Resp. at 2. Because the available
20 information does not allow us to make a reasonable inference that Berg exceeded his share of use,
21 there is no reason to believe that any of the flights resulted in 714 LLP making, or the Committee

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1 receiving, excessive in-kind contributions in violation of the Act.¹¹ In addition, based on the
2 timing of the payments, it appears that the Committee timely disclosed the payments in its
3 disclosure reports. *See supra* fn. 5.

4 Accordingly, we recommend that the Commission find no reason to believe
5 that 714 Partners LLP, Dr. Jim Frick, James Wieland, and Bradley Williams violated 2 U.S.C.
6 § 441a(a)(1)(A) and 11 C.F.R. § 100.93 by making excessive in-kind contributions for air travel.
7 We also recommend that the Commission find no reason to believe that Congressman Rick Berg,
8 Berg for Senate and Kelly Zander in his official capacity as treasurer violated 2 U.S.C. § 441a(f)
9 and 11 C.F.R. § 100.93 by accepting excessive in-kind contributions for air travel. We further
10 recommend that the Commission find no reason to believe that Berg for Senate and Kelly Zander
11 in his official capacity as treasurer violated 2 U.S.C. § 434(b) by failing to report travel
12 expenditures.

¹¹ If Berg's use of the aircraft exceeded his proportional share, the Committee would be required, for those flights taken after his proportional share was exceeded, to reimburse the pro rata share of the fair market value of the flight (as determined by dividing the fair market value of the normal and usual charter fare or rental fare for a comparable plane of comparable size by the number of candidates on the flight) no later than seven (7) calendar days after the date the flight began in order to avoid the receipt of an in-kind contribution. 2 U.S.C. § 439a(c)(1)(B), 11 C.F.R. § 100.93(c). It is apparent that the timing of the Committee's payments for the costs of the flights at issue did not adhere to this timeframe, and we would also have to analyze whether the amounts paid by the Committee meet the "fair market value" standard. Even if there were such flights, however, the amounts at issue would only include the costs for any flights taken after the limit was exceeded and would likely be *de minimis*, and not worth the use of the Commission's resources to pursue.

Similarly, with regard to flights # 1 and #2, we cannot make a reasonable inference that Berg used the plane on those dates. Respondents deny that Berg used the plane to travel on those occasions, and the Complaint provides no facts, aside from Berg's presence at the event, to support its allegation. As a result, there is no reason to believe that the Act was violated in connection with these two flights.

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IV. RECOMMENDATIONS

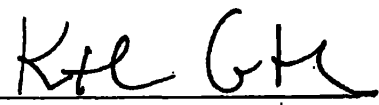
- (1) Find no reason to believe that 714 Partners LLP, Dr. Jim Frick, James Wieland, and Bradley Williams violated 2 U.S.C. § 441a(a)(1)(A) by making excessive in-kind contributions for air travel;
- (2) Find no reason to believe that Congressman Rick Berg, Berg for Senate and Kelly Zander in his official capacity as treasurer violated 2 U.S.C. § 441a(f) by accepting excessive in-kind contributions for air travel;
- (3) Find no reason to believe Berg for Senate and Kelly Zander in his official capacity as treasurer violated 2 U.S.C. § 434(b) by failing to report travel expenditures;
- (4) Approve the attached Factual and Legal Analyses;
- (5) Approve the appropriate letters; and
- (6) Close the file.


Daniel A. Petalas
Associate General Counsel
For Enforcement


Date

10-31-13

BY:


Kathleen Guith
Deputy Associate General Counsel
for Enforcement


Mark Shonkwiler
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